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U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC-00-247-53932 Office: VERMONT SERVICE CENTER Date: MAR 09 2004

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was revoked by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian Food Cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> *(g) Initial evidence -- (1) General.*
>
> . . .
>
> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

Eligibility in this matter hinges on the beneficiary's qualifications as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is April 5, 2000. The beneficiary's salary as stated on the labor certification is $9.50 per hour or $19,760.00 per year. The only required education, training or experience stated in block 14 of the ETA 750 is two years of experience in the job offered.

The petition was received by the Vermont Service Center on August 15, 2000. The director approved the petition on October 5, 2000. At the time of the approval the beneficiary was still in his native country of India. When the beneficiary's visa application was being considered at the United States Embassy in New Delhi it was marked "for further investigation to ascertain the authenticity of the [beneficiary's] employment in India." Memorandum, November 16, 2001, American Embassy, New Delhi (copy in the record).

At an interview at the American Embassy on May 8, 2001 an investigator from the anti-fraud unit asked the beneficiary some questions pertaining to his knowledge of Indian cooking and concluded that the beneficiary lacked the required skills and experience as claimed on his experience certificates. The embassy then prepared a memorandum to the Vermont Service Center recommending that the petition be revoked. Memorandum, November 16, 2001, American Embassy, New Delhi (copy in the record).

On February 25, 2002 the director issued a notice of intent to revoke the petition. Counsel responded with a letter dated March 22, 2002, accompanied by an affidavit from a cook at an Indian restaurant in Richmond, Virginia.

On June 4, 2002 the director revoked the petition.

Counsel filed a notice of appeal which was received by the Vermont Service Center on June 21, 2002. Counsel later submitted a brief to the AAO, which was received by the AAO on July 19, 2002. Nonetheless, the notice of

appeal apparently had not been transmitted to the AAO, for the director returned the notice of appeal to counsel with an I-797 notice dated August 13, 2002 stating that the check submitted with the notice of appeal "has an incorrect guarantee amount, is not signed, or the numerical and written amount do not match."

The I-290B notice of appeal was resubmitted on August 20, 2002 and was then accepted for filing.

The director found that the notice of appeal resubmitted on August 20, 2002 was untimely, since it was submitted more than "33 days" [sic] after the revocation decision of June 4, 2002. The director therefore treated the notice of appeal as a motion to reopen, and denied the motion on December 16, 2002.

Counsel then filed a second I-290B notice of appeal, which was received by the Vermont Service Center on January 16, 2003. This notice of appeal is the one which is now before the AAO. With the second notice of appeal counsel submits a brief and additional evidence.

With regard to the procedural posture of this appeal, we find that the director was correct in treating the petitioner's first notice of appeal as a motion.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states:

> *(2) Untimely appeal treated as motion.* If an untimely appeal meets the requirements of a motion to reopen as described in § 103.5(a)(2) of this part or a motion to reconsider as described in § 103.5(a)(3) of this part, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

The notice of appeal bears a date stamp by the Vermont Service Center showing initial receipt on June 21, 2002. This date was one day before the expiration of the appeal period of the June 4, 2002 revocation decision. Appeals of revocation decisions must be made within fifteen days of the decision, plus three days when the notice of the decision is by mail. *See* 8 C.F.R. § 205.2(d); 8 C.F.R. § 103.5a(b).

Counsel was not notified of any problem with the notice of appeal until the director's I-797 notice of August 13, 2002 which returned the notice of appeal to counsel because of a problem with the filing fee. Seven days later, on August 20, 2002, the notice of appeal was resubmitted. The record does not show the specific problem with the filing fee which had caused the director to reject the earlier submission of the notice of appeal.

In his brief in the present appeal counsel states, "Due to a clerical error outside the control of the Petitioner, said Notice of Appeal was deemed to have been filed on August 20, 2002. As such, the Notice of Appeal has been deemed by [CIS] to be a Motion to Reopen." Petitioner's Brief of January 15, 2003, page 2. Counsel offers no further argument on this point and submits no evidence in support of his claim that a "clerical error" caused the director to find the filing date of the initial notice of appeal to be August 20, 2002, a date which was beyond the eighteen-day appeal period.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Lacking any evidence that the initial submission of the notice of appeal was improperly rejected, the AAO finds that the director was correct in finding that the resubmission on August 20, 2002 was untimely and in treating that notice of appeal as a motion.

In his decision of December 16, 2002, the director says that the notice of appeal would be treated as a motion to reopen. However, the notice of appeal should have been treated as a motion to reconsider, since the notice of appeal contained only legal arguments and was supported by no new evidence. *See* 8 C.F.R. §§ 103.5(a)(2) and (3).

The director's decision of December 16, 2002 incorrectly characterizes the matter at issue as a denial of an I-140 petition, rather than as a revocation. The decision incorrectly states that the permissible appeal period had been 30 days plus three days for mailing, rather than 15 days plus three days for mailing, which is the relevant period for appeals of revocations. *See* 8 C.F.R. § 205.2(d) and 8 C.F.R. § 103.5a(b). The director states that the petitioner had "not submitted any new documentation or facts to overcome the prior denial." This statement is also incorrect, since the record contains a brief from counsel stamped as received by the AAO on July 19, 2002. Apparently, however, counsel's brief submitted to the AAO was not in the file before the director when he issued his December 16, 2002 denial.

Counsel was correct in submitting his brief to the AAO, since the instructions to the Form I-290B notice of appeal require all supplemental documentation submitted after the notice of appeal to be sent directly to the AAO. The director's delay from the notice of appeal's submission date of June 21, 2002 until rejecting the notice of appeal on August 13, 2002 left counsel with no reason to think that the notice of appeal had not been promptly transmitted to the AAO, along with the file or with a record of proceeding. In any event, the director's decision of December 16, 2002 addresses none of the arguments raised in petitioner's brief filed July 19, 2002.

After the director's December 16, 2002 decision, counsel filed a second notice of appeal, appealing that decision. Appeals of decisions on motions are authorized by 8 C.F.R. § 103.5a(a)(6) which permits an appeal to the AAO of a decision made as a result of a motion if the original decision was appealable to the AAO. Counsel's second notice of appeal was received by the director on January 16, 2003. This date was within the thirty-day period for appeals set forth at 8 C.F.R. § 103.3(a)(2)(i), plus three additional days allowed when service of the decision is by mail. *See* 8 C.F.R. § 103.5a(b).

An initial question on appeal concerns the evidence submitted by counsel for the first time on appeal. Most of the evidence submitted on appeal consists of copies of documents previously in the record. However, copies of five published recipes for Indian dishes are submitted for the first time on appeal. Counsel makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the district director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated as follows:

> Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the beneficiary's experience. The recipes are relevant because the dishes are ones about which the beneficiary was questioned during his interview at the American Embassy in New Delhi. The embassy officer found that the beneficiary's descriptions of the recipes for those dishes were incorrect. On this basis the embassy recommended revocation of the previously approved I-140 petition on behalf of the beneficiary.

The petitioner was put on notice of the specific concerns raised by the American Embassy though the notice of intent to revoke issued to the petitioner on February 25, 2002, to which was attached a copy of the November 16, 2001 memorandum from the American Embassy.

The petitioner did not submit any copies of recipes in its response to the notice of intent to revoke, apparently believing that the affidavit submitted from a cook at an Indian restaurant would be sufficient to satisfy the concerns raised in the American Embassy's memorandum. The petitioner has offered no explanation for its failure to submit the published recipes prior to the decision of the director.

For the above reasons, the evidence submitted for the first time on appeal will not be considered for any purpose. The AAO will therefore evaluate the director's decision based on an analysis of the evidence in the record prior to the decision of the director.

Counsel's assertions in the brief attached to the second notice of appeal focus mainly on the Indian recipes submitted for the first time on appeal. For the reasons discussed above, those recipes are not being considered on appeal and the arguments based on those recipes therefore also will not be considered. However, in counsel's prior brief, submitted on July 19, 2002, counsel makes assertions based on the record as it existed prior to the date of the director's December 16, 2002 decision, and we will address those assertions here, along with other assertions made in the second brief.

Counsel asserts that the American Embassy employed the wrong criteria in evaluating the beneficiary's qualifications and that the director incorrectly relied on the American Embassy's analysis in revoking the petition.

The American Embassy's finding that the beneficiary lacked the required qualifications was based on an interview which consisted of a total of nine questions, including an initial question asking the beneficiary's name. The questions and answers are summarized in the memorandum from the American Embassy which is mentioned above. The interviewer is identified in the memorandum only as "an AFU investigator." Parenthetical remarks after several of the answers appear to indicate the investigator's comments on the beneficiary's answers, finding those answers to be incorrect. Following the summary of the questions and answers the Embassy memorandum states "In short all of the answers given by the beneficiary were inconsistent with common North Indian cooking practices." Memorandum, November 16, 2001, American Embassy, New Delhi, page 2 (copy in the record).

The questions about the beneficiary's knowledge of specific Indian dishes were apparently intended to help determine whether the beneficiary had worked as a cook for the hotel which had submitted a work experience letter on his behalf, the Hotel Taj.

Only one question directly asked the beneficiary about his experience, asking how long he had been a cook. The beneficiary's answer is summarized as "For last six-seven years." That answer was consistent with the beneficiary's information on the ETA 750.

The beneficiary was asked five questions on how he would prepare specific Indian dishes and one question asking him to explain the difference between two specific Indian dishes. The investigator found several of those answers to be incorrect. However, the investigator's assertions that the beneficiary's answers to several of the questions were incorrect are supported by no evidence.

The field of cooking is one in which many variations exist in recipes. Therefore, to support a finding that the beneficiary's answers on how to prepare specific dishes were incorrect some evidence would be needed to show that the answers given by the beneficiary were inconsistent with all of the variations in recipes which exist in the region of India where the beneficiary claimed to have worked. In this regard, cooking is unlike highly standardized fields such as computer technology in which all persons in a field could be expected to share common knowledge about certain topics.

The director was required to base the revocation decision on evidence in the record. Conclusions by an embassy investigator are not evidence.

The Embassy memorandum says that the letter of employment from the Hotel Taj states "that the beneficiary is a specialist in North Indian cooking and has been cooking for this restaurant from May 1994 to July 1998." However the letter from the Hotel Taj in fact does not refer to the beneficiary as a "specialist" nor does it mention "North Indian" cooking. It merely says that the beneficiary was "a cook of Indian and Mughlai cuisine."

Even if the investigator considered "Mughlai" cuisine to be a synonym for "North Indian" cuisine, the investigator's reasons for that conclusion are not stated, nor are the investigator's reasons for ignoring the more general term of "Indian" cuisine in the letter from the Hotel Taj.

The Embassy memorandum also says that the ETA 750 states that the beneficiary "should be able to prepare and cook a variety of traditional North Indian food." But in fact the ETA 750 contains no reference to "traditional North Indian food." And even if the ETA 750 contained the language as claimed in the Embassy memorandum, the issue before the director did not concern the beneficiary's proposed duties in the petitioning restaurant, shown in block 13 of the ETA 750, but rather the required previous experience of the beneficiary, shown in block 14 of the ETA 750. The job title in block 9 of the ETA 750 is "Indian Food Cook" and block 14 simply requires two years of experience in that job, with no other special requirements listed in block 15 or elsewhere.

In response to the director's notice of intent to revoke, the petitioner submitted the affidavit mentioned above from a Mr. Chhinda Sandhu, identified as an Indian food cook for the past ten years at a restaurant in Richmond, Virginia. Mr. Sandhu states that "it is not unusual to find Indian chefs who prepare the same traditional Indian dishes in different ways." He states that he has reviewed the transcript of the interview of the beneficiary at the American Embassy and that from that transcript it appears that the beneficiary "still needs further training to be a quality Indian cook." Mr. Sandhu continues, "However, his cooking and food preparation methods as described in his interview cannot be described as completely inaccurate. Therefore I must conclude that Mr. Amrik Singh does appear to be a poorly trained Indian food cook." Affidavit of Chhinda Sandhu, March 21, 2002.

The ETA 750 requires minimum qualifications of nothing more than two years of experience as an Indian Food Cook. It does not require that the beneficiary be a "quality" Indian cook, nor one who is well-trained. Nor does the ETA 750 require knowledge of or experience with "North Indian" cuisine as described in the Embassy memorandum. No evidence in the record indicates that the beneficiary lacks the two years of experience as an Indian Food Cook required by the ETA 750.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.